

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

LOCAL UNION NO. 226)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS OPEN END)	
PENSION TRUST FUND, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION
)	
)	No. 04-2237-CM
)	
FLOWERS ELECTRIC, INC.,)	
)	
Defendant.)	
)	

MEMORANDUM AND ORDER

On May 25, 2004, plaintiffs filed the present action seeking to collect fringe-benefit contributions pursuant to sections of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132 and 1145, and the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. On June 16, 2004, plaintiffs' summons was returned executed, which informed defendant that it's answer was due in twenty days. Defendant has not answered in this action, and on July 13, 2004, plaintiffs applied to the Clerk of the Court for an entry of default, which the clerk entered on July 14. Pending before the court is plaintiffs' Motion for Default Judgment (Doc. 5).

Pursuant to Fed. R. Civ. P. 55(b)(2), the court is authorized to enter a judgment by default. If the party against whom judgment by default is sought has appeared in the action, the party must be served with written notice of the motion for default judgment at least three days in advance. Fed. R. Civ. P.

55(b)(2). Defendant was personally served, but, to date, defendant has not filed any responsive pleadings or taken any other action in this case. Therefore, defendant has not appeared in this action and written notice need not be provided to defendant. *See Rogers v. Hartford Life and Accident Ins. Co.*, 167 F.3d 933, 937 (5th Cir.) (holding that mere acceptance of formal process does not constitute an appearance for purposes of Rule 55(b)(2)).

ERISA provides liability for an employer who is obligated to make employee-benefit contributions but fails to do so. *See* 29 U.S.C. § 1145. An obligated employer who fails to make the required contributions becomes liable to the employee-benefit plan for (1) the unpaid contributions, (2) interest on the unpaid contributions, (3) liquidated damages provided under the plan in an amount not in excess of twenty percent, (4) reasonable attorneys' fees, (5) other appropriate legal or equitable relief. 29 U.S.C. § 1132(g)(2).

In support on their request for damages, plaintiffs have submitted the affidavit of Gary Muckenthaler, who is the Plan Manager for the plans included in this action. Muckenthaler includes with his affidavit a spreadsheet detailing defendant's unpaid contributions for each of the last five months, along with liquidated damages and accrued interest per month. The court finds that the total of unpaid contributions owed is \$101,115.88; liquidated damages total is \$7631.28; and, the accrued interest due is \$971.98. The sum, therefore, is \$109,719.14. The court further finds that, based on Muckenthaler's affidavit, the amount due is certain in this case and a hearing on the matter is not necessary.

IT IS THEREFORE ORDERED that plaintiffs' Motion for Default Judgment (Doc. 5) is granted and default judgment in the amount of \$109,719.14 is entered in plaintiff's favor.

Dated this 23rd day of July 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge